

No. 1-11-3546

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE APPELLATE
COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 11CR10261
)	
THOMAS JOHNSON,)	The Honorable
)	Carol A. Kipperman,
Defendant-Appellant.)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Howse and Justice Lavin concurred in the judgment.

ORDER

¶ 1 Held: Where evidence adduced at trial, including defendant's own statement, was overwhelming that defendant took active role in armed robbery, trial counsel was not ineffective for failing to request jury instruction on simple robbery. Additionally, where there was no finding that the victim suffered great bodily harm, trial court erred in disallowing day-for-day good-conduct credit. Conviction and sentence affirmed; portion of the trial court's sentencing order requiring defendant to serve at least 85% of his sentence vacated; mittimus corrected.

¶ 2 Following a jury trial, defendant Thomas Johnson was convicted of armed robbery with a firearm in violation of section 18-2 of the Criminal Code of 1961 (720 ILCS 5/18-2(a)(2) (West

2010)), based on a theory of accountability. Defendant was sentenced to 28 years' imprisonment to be served at 85%. This sentence included a 15-year firearm enhancement. On appeal, defendant contends: (1) he was denied the effective assistance of trial counsel where trial counsel failed to request an instruction for the lesser-included offense of robbery; and (2) his sentence for armed robbery must be modified to allow him to earn day-for-day good-conduct credit.¹ For the following reasons, we affirm defendant's conviction and sentence for armed robbery, and vacate only the portion of the trial court's sentencing order requiring defendant to serve at least 85% of his sentence.

¶ 3 I. BACKGROUND

¶ 4 Defendant and co-offender Devante Landers were charged with armed robbery and aggravated unlawful restraint for an event in which victim Bradley Foreman was robbed at gunpoint by three individuals. The State elected to proceed only on the armed robbery charge.

¶ 5 At trial, Foreman testified that he was returning home via the Blue Line elevated train (the El) at approximately 8:15 p.m. on May 11, 2011. He exited the train at the Oak Park stop

¹ Initially, defendant also argued that the 15-year firearm enhancement for the offense of armed robbery was void, as it had been declared unconstitutional in *People v. Hauschild*, 226 Ill. 2d 63 (2007). After defendant's opening brief was filed, however, our supreme court released *People v. Blair*, 2013 IL 114122, in which it held that the enhancement was revived through an amendment to the armed violence statute. *Blair*, 2013 IL 114122. Defendant properly concedes this issue.

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carrying his briefcase with his billfold, keys, cell phone, and various papers inside. He also had approximately \$80 cash in his pants pocket. His first anticipated stop was a friend's house nearby. He walked a few blocks from the El, nearing Home Avenue, when he was approached by three young African American men. Foreman identified defendant in open court as one of those men. One of the individuals, later identified by Foreman as Landers, asked Foreman for a cigarette. When Foreman said, "no", the three men "converged" on him and forced him around the corner into the quieter area of Home Avenue. They were the only people on Home Avenue at this time.

¶ 6 The defendant took Foreman's briefcase and handed it to one of his cohorts. Defendant then went through Foreman's pockets and "frisked [him] all up and down [his] body." Defendant removed the money from Foreman's pants pocket. While defendant was doing this, defendant was not wearing a mask, and Foreman was able to clearly see defendant's face.

¶ 7 The man who had previously asked Foreman for a cigarette stood nearby, telling Foreman to "just be cool." Then that man gestured for Foreman to look at something. Foreman did so, and saw that the man was pointing a gun at Foreman's stomach. The gun was touching Foreman's body.

¶ 8 After defendant frisked him, Foreman saw the three offenders get into a black or silver sedan that was approximately 200 feet away. The car sped away. Foreman ran closer to the car and was able to see the license plate number. He repeated the number over and over again as he walked to his friend's house nearby. His friend wrote the number down and called the police.

¶ 9 Two days later, Foreman was notified by Waste Management that a driver had recovered

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his briefcase from a dumpster. Foreman retrieved the briefcase.

¶ 10 On May 17, 2011, at the request of Village of Oak Park Police Detective Angelo Episcopo, Foreman viewed a photo array at the Oak Park Police Department. Foreman identified defendant's photo as the person who had frisked him and taken his money and briefcase. He also identified Devante Landers' photograph as the gunman. Foreman testified he is "pretty good with faces" and he had "no doubt" when he identified defendant and Landers in the photographs as the offenders.

¶ 11 Later, on May 27, 2011, Foreman viewed three line-ups. In one of the line-ups, he identified defendant, and in another line-up, he identified Landers as the gunman. Again, he testified that he did not have any doubt when he identified defendant in the line-up.

¶ 12 Foreman testified that, on the same day he viewed the line-ups, he was shown a cell phone which he identified as the one stolen from him on May 11, 2011.

¶ 13 Detective Episcopo testified he was assigned to investigate an armed robbery that occurred on May 11, 2011. During his investigation, he learned that the offenders were three African American males who had displayed a gun and then fled in a smaller silver or grey Toyota or Mitsubishi that was approximately 10 years old with license plate number 9543901. Detective Episcopo put out a message to other area police departments to inform them of the occurrence and distribute the description of the offenders and the vehicle. He was contacted on May 16 by the Bellwood Police Department, and learned that Bellwood police officers had arrested defendant, Landers, and Daryl Brady on May 12, 2011, after they fled from a Toyota Avalon with a license plate number of 9543903. He also learned that a loaded, silver gun was recovered from

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an individual named Dantis Zimmerman.

¶ 14 Bellwood Police officer John Trevarthen testified that, as he was conducting routine patrol alone in a marked squad car on May 12, 2011, he saw a grey Toyota Avalon with license plate number 9543903. Officer Trevarthen radioed for back-up, and then followed the grey car to a McDonald's restaurant. As he pulled in behind the grey car, the four male occupants of the vehicle exited and fled, but were immediately apprehended by other police officers on the scene. Officer Trevarthen identified defendant in court as one of the individuals from the vehicle. He also testified that Darryl Brady and Devante Landers had been in the vehicle. Defendant, Brady, and Landers were all transported to the Bellwood Police station, and the Toyota Avalon was impounded. During an inventory search of the vehicle, officers found a cell phone in the glove compartment, which Foreman later identified as the cell phone the offenders took from him during the robbery.

¶ 15 The following day, Officer Trevarthen was on patrol in Bellwood when he noticed another vehicle he believed may have been relevant to the robbery investigation. Officer Trevarthen pulled the car over for a traffic violation and arrested the occupants for having an open container of alcohol in the passenger compartment. One of the occupants was Dantis Zimmerman. During an interview at the police station, Zimmerman told Officer Trevarthen that the gun used in the robbery was at his house. Zimmerman's father brought the loaded gun to the police station, where it was then inventoried.

¶ 16 On May 17, 2011, Detective Episcopo spoke with Westmont Police Department Detective Borgardt and learned Detective Borgardt had recovered a cell phone inside a Toyota

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Avalon. Detective Episcopo then prepared a photo array that consisted of six photographs, including photographs of defendant, Landers, and Brady. Detective Episcopo recalled showing the photo array to Foreman, who identified the photograph of defendant as being the person who frisked him and took his briefcase and cash, and the photograph of Landers as being the person who held the gun. He did not identify the photograph of Brady. Detective Episcopo also showed Foreman a photograph of the cell phone recovered from the Toyota Avalon, which Foreman identified as his stolen phone.

¶ 17 On May 27, 2011, Detective Episcopo had Foreman view a physical line-up during which he again identified defendant as the person who frisked him and took his briefcase and cash, and Landers as the person who held the gun. Additionally, Detective Episcopo showed Foreman the actual cell phone that had been recovered, and Foreman identified it as his stolen cell phone.

¶ 18 Detective Episcopo testified that he and Detective Stewart then interviewed defendant at the DuPage County Jail. After advising defendant of his *Miranda* rights, defendant agreed to speak with him about an armed robbery in Oak Park on May 11, 2011. Detective Episcopo testified that defendant recalled driving around in a car with Daryl Brady and Devante Landers. Landers was driving, and had seen a person they could rob. He pulled the car over and said, "we're going to get him." Defendant admitted having taken Foreman's briefcase, but said Landers frisked Foreman while Brady held the gun. They also took a wallet with some credit cards and a cell phone from Foreman. He said Dantis Zimmerman (also known as DJ) was parked in a nearby Grand Am vehicle. After the robbery, they all got into the car and drove to the JJ Fish Restaurant at 25th Avenue and I-290 in Bellwood. Brady and Landers went through the briefcase

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in the front seat of the vehicle, removing the credit cards. Defendant then put the briefcase in the dumpster behind JJ Fish. Afterward, they tried to use the credit cards at a gas station, but the transaction was denied.

¶ 19 Defendant was not aware of any cash having been taken from Foreman, and explained that the agreement was the three of them would split any cash they stole, and the others did not tell him about any cash. Landers and Brady dropped defendant off at his house.

¶ 20 Assistant State's Attorney Lisa Castillo testified that she spoke with defendant, who provided her with the same details he provided the detectives regarding the incident. ASA Castillo prepared a handwritten statement based on what defendant told her. She, Detective Episcopo, and Detective Stewart reviewed the statement along with defendant, who was allowed to make changes. After reviewing the statement, defendant signed the bottom of each page to indicate the statement was true.

¶ 21 ASA Castillo published the statement to the jury:

"[ASA CASTILLO]: Okay. This is the statement of Thomas Johnson taken May 27th, 2011, at 4:45 p.m. at the DuPage Department of Corrections. Present is ASA Lisa Castillo, Detective Episcopo, Detective Stewart and Thomas Johnson. The statement is regarding the armed robbery which occurred on May 11, 2011, near 850 Home Avenue in Oak Park, Illinois by Thomas Johnson.

* * *

After being advised of his constitutional rights, and after stating he understood each and every one of his rights, and after being advised that Assistant State's Attorney Lisa Castillo is a lawyer, a prosecutor but not his lawyer, Thomas Johnson agreed to give the following statement, which is a summary and not word for word.

Thomas Johnson states he is 18 years old, and he was born January 16th, 1993. Thomas states he lives at 941 25th Avenue in Bellwood, Illinois, with his mother Maritsa Johnson, his father Timothy Johnson and his two brothers. Thomas states that he has lived there since about January, 2011, and moved there from Columbus, Ohio.

Thomas states that he lived in Columbus, Ohio for about three years before he moved back to Illinois. Thomas states that he is currently a sophomore at Proviso West High School at 4701 Harrison Street in Hillside, Illinois, and has gone there since January, 2011.

Thomas states that he is friends with Devante Landers. Thomas identified Exhibit 1 as Devante Landers. Thomas states he has been friends with Devante for about one month. Thomas states he had moved - - I'm sorry, had met Devante through DJ. Thomas

states that DJ is Dantis Zimmerman. Thomas states he knows DJ from Proviso West High School.

Thomas states he also knows Darryl. Thomas states that he doesn't know Darryl's last name, but met him through Devante about a month ago. Thomas states that he remembers that it was understood between Devante Landers, DJ and Darryl and Thomas that if any of us robbed somebody we would each get a cut.

Thomas states that on May 11th, 2011, he was in a car with Darryl and Devante Landers. Thomas states that Devante Landers was the driver. Darryl was the front passenger, and he was the back passenger. Thomas states that the car they were driving in was silver.

Thomas states that DJ was in another car and following behind the car that he was in. Thomas states that Devante Landers pulled the car over on a side street near 850 Home Avenue in Oak Park. Thomas states that Devante *** pulled over because he saw someone walking.

Thomas states that Devante said, in quotes, 'I got somebody, get out of the car.' Thomas states that he took that to mean that they were going to rob somebody. Thomas states that DJ pulled behind them and parked his car. Thomas states that DJ

did not get out of the car.

Thomas states that him, Devante Landers and Darryl got out of the car. Thomas states that they walked up to a guy who was holding a bag over his shoulder. Thomas identified Exhibit 2 as the guy they robbed.²

Thomas states that Darryl asked this guy for a cigarette. Thomas states Darryl pulled a gun out and pointed it at the guy in Exhibit 2. Thomas identified Exhibit 2 as the gun Darryl used. Thomas states that the gun belonged to DJ. Thomas states that Darryl held this guy's arm down to his side and told him not to move.

Thomas states that he grabbed this guy's bag, and Devante Landers patted him down. Thomas states that Devante Landers took the guy's phone and wallet. Thomas identified Exhibit 4 as the cell phone they took from the guy they robbed.

Thomas states that him, Devante Landers and Darryl then ran back to the car. Thomas states they sat in the same seats as before, and then Devante Landers drove off. Thomas states that DJ followed them in his car. Thomas states that he still had the bag, and Darryl told him to give him the briefcase. Thomas states that

² Exhibit 2 was a photograph of the victim, Foreman.

he gave Darryl the briefcase, and Darryl opened it and went through it.

Thomas states that Devante Landers drove to JJ Fish at 1047 25th Avenue in Bellwood, Illinois. Thomas states that when they got to JJ Fish Darryl told him to throw out the briefcase because there was nothing in it. Thomas states that Devante kept the cell phone they robbed. Thomas states that he did not keep any of the proceeds."

¶ 22 After admitting Foreman's cell phone, the gun, photographs, and defendant's typed statement into evidence, the State rested. The defense filed motion for a directed verdict, which the court denied.

¶ 23 Village of Oak Park Police officer Toni Radtke testified that she was a patrol officer in May 2011, when she spoke with Foreman. Foreman told her that he "[could] identify offender Number 1 but did not get a good look at Offenders 2 and - or 3." During cross-examination, Officer Radtke also testified that she spoke to Foreman in response to an armed robbery call and that Foreman appeared "frightened and a little bit out of sorts." Foreman did not tell her he would be unable to identify any of the offenders.

¶ 24 Defendant testified in his own defense that, on May 11th, 2011, he met up with DJ, Devante, and Darryl. Eventually, it got late and they decided to go home. Defendant, Devante, and Darryl all drove in one car and DJ and an individual named Quinton followed in a separate car. Defendant was seated in the backseat. As they passed through Oak Park, Devante parked

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the car and said, "I got somebody." Darryl got out of the car and instructed the others to get out, as well. Defendant testified:

"[THE DEFENDANT]: By the time I got out [of the] car, Darryl was already on Foreman, and his back was facing towards me and Devante. When I got up to him, that's when Menmen took his bag off and handed it to me - - I mean Darryl. Darryl took his bag off and handed it to me. I looked towards Devante. Devante was patting him down. That's when I looked back over and realized Darryl had a gun."

After taking Foreman's things, defendant, Darryl, and Devante ran to the car and drove away.

¶ 25 Defendant explained that the portion of his handwritten statement that was published to the jury by ASA Castillo regarding the prior agreement amongst defendant and his friends about splitting the proceeds was incorrect. He explained:

"[THE DEFENDANT:] It was no - - it wasn't no plan. We was coming - - we was on our way home, and it just happened. And then [ASA Castillo] said, well, then how was you all going to split it up? And I was like I guess - - I told her like I guess that there was no understanding we were going to split it up. It was whoever did something was going to get a cut."

¶ 26 Defendant denied having taken Foreman's property by "threatening the use of force," explaining that he did not know there was a gun involved. He said, "When I got up there, Darryl

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handed me the briefcase." Defendant denied having taken Foreman's cell phone and cash, and denied going through Foreman's pockets.

¶ 27 On cross-examination, defendant admitted to knowing he and his friends were about to rob Foreman:

"[ASA JOSEPH LATTANZIO] Q: [As you are driving with your friends,] one of you sees Bradley Foreman?

[THE DEFENDANT] A: Yes.

Q: And he's wearing a business suit, right?

A: Yes.

Q: Carrying a big briefcase, right?

A: Yes.

Q: And what - - your buddy says I got it, let's go?

A: Yes.

Q: And you know that means we're going to go rob him, right?

A: Yes.

Q: And you then ran out of the car and ran the other way because you didn't want any part of robbing Brad Foreman, right?

A: No.

Q: You said good idea, right?

A: No.

Q: You didn't say those words, but you said those words when you

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got out of the car, right?

A: Yes.

Q: And you walked over to him?

A: Yes.

Q: And you joined in on taking everything from Brad Foreman, right?

A: Yes.

Q: And at the time you were taking everything with your pals from Brad Foreman - - and your buddy had a handgun, right?

A: Yeah.

* * *

Q: Well, you knew that when you got out of the car the idea was to get whatever you could from this guy, right?

A: Yes, but I ain't know he had a weapon."

Defendant also admitted on cross-examination that there was "an unspoken agreement that when [they] robbed [this person, they] would share the proceeds."

¶ 28 Prior to the end of trial, the parties participated in a jury instruction conference with the trial court. The jury received three instructions that are relevant to this appeal. First, the jury received Illinois Pattern Instruction (IPI) (Criminal) 5.03, which defines accountability of one for the actions of another:

"A person is legally responsible for the conduct of another

person when, either before or during the commission of an offense, and with the intent to promote or facilitate the commission of the offense, he knowingly solicits, aids, abets, agrees to aid, or attempts to aid the other person in the planning or commission of the offense." Illinois Pattern Jury Instruction, Criminal, No. 5.03 (4th ed. 2000).

The jury also received IPI (Criminal) 14.05, which defines armed robbery:

"A person commits the offense of armed robbery when he, while carrying on or about his person, or while otherwise armed with a firearm, knowingly takes property from the person or presence of another by the use of force or by threatening the imminent use of force." Illinois Pattern Jury Instruction, Criminal, No. 14.05 (4th ed. 2000).

¶ 29 Additionally, the jury received IPI (Criminal) 14.06, which is the issues instruction for armed robbery:

"To sustain the charge of armed robbery, the State must prove the following propositions:

First Proposition: That the defendant, or one for whose conduct he is legally responsible, knowingly took property from the person or presence of Bradley Foreman; and

Second Proposition: That the defendant, or one for whose

conduct he is legally responsible, did so by the use of force or by threatening the imminent use of force;

Third Proposition: That the defendant, or one for whose conduct he is legally responsible, carried on or about his person a firearm or was otherwise armed with a firearm at the time of the taking." Illinois Pattern Jury Instruction, Criminal, No. 14.06 (4th ed. 2000).

Both IPI 5.03 and IPI 14.06 were given over defendant's objections.

¶ 30 After closing arguments, and following jury instructions and deliberations, the jury found defendant guilty of armed robbery with a firearm. Following the denial of a motion for a new trial, the case proceeded to sentencing. The court sentenced defendant to 28 years' imprisonment, including a 15-year firearm enhancement.

¶ 31 Defendant appeals.

¶ 32 II. ANALYSIS

¶ 33 i. Jury Instructions, Accountability, and Armed Robbery

¶ 34 Defendant first contends he was denied the effective assistance of counsel where counsel failed to request an instruction on the lesser-included offense of robbery. Specifically, defendant argues that we should remand this cause for a new trial, where, because the defense theory was premised on defendant's testimony that he was present during and participated in the taking but did not know his co-offender had a gun, the jury should have been given an instruction on simple

robbery. We disagree.

¶ 35 In Illinois, a person commits armed robbery when, in pertinent part, he takes property from the person or presence of another by the use of force or by threatening the imminent use of force while he carries on or about his person or is otherwise armed with a firearm. 720 ILCS 5/18-2(a)(2) (West 2010). A person is accountable for another's actions when "[e]ither before or during the commission of the offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense." 720 ILCS 5/5-2(c) (West 2010); *People v. Williams*, 324 Ill. App. 3d 419, 434 (2001) (A defendant may be deemed legally accountable for another's conduct where, in relevant part, he shared the criminal intent of the principal or there was a common criminal design). Although mere presence at the scene of a crime is insufficient to sustain a conviction based on an accountability theory, a defendant may be held accountable for the actions of another performed under a common plan or purpose. *People v. Cooper*, 194 Ill. 2d 419, 434 (2000). "The 'common design' rule provides that where two or more persons engage in a common criminal design or agreement, any acts in the furtherance of that common design committed by one party are considered to be the acts of all parties to the design or agreement and all are equally responsible for the consequence of the further acts." *Cooper*, 194 Ill. 2d at 434-35. A common purpose may be established from the surrounding circumstances. *People v. Jones*, 364 Ill. App. 3d 740, 747 (2006).

¶ 36 Generally, a defendant is entitled to a lesser included offense instruction only if the evidence presented at trial would permit a jury rationally to find the defendant guilty of the lesser

included offense and acquit him of the greater offense. *People v. Greer*, 336 Ill. App. 3d 965, 978 (2003). "[A] defendant is entitled to the lesser included offense instruction if there is any evidence tending to prove the defendant guilty of the lesser offense rather than the greater, even if that evidence is very slight." *People v. Washington*, 375 Ill. App. 3d 243, 249 (2007). Even where there is an instructional error, however, and the jury is incorrectly not instructed on a lesser-included offense, reversal is not warranted where evidence of the defendant's guilt of the greater offense is so clear and convincing that the jury could not have reasonably found him not guilty. *Washington*, 375 Ill. App. 3d at 249. An instruction on a lesser-included offense is not required where "the evidence rationally precludes such an instruction." *Greer*, 336 Ill. App. 3d at 978.

¶ 37 To establish a claim of ineffective assistance of counsel, a defendant must show that: (1) his attorney's representation fell below an objective standard of reasonableness; and (2) he was prejudiced by this deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *People v. Palmer*, 162 Ill. 2d 465, 475 (1994). Failure to make the requisite showing of either deficient performance or sufficient prejudice defeats the claim. *Palmer*, 162 Ill. 2d at 475-76. To satisfy the first prong, a defendant must overcome the presumption that contested conduct which might be considered trial strategy is generally immune from claims of ineffective assistance of counsel. *People v. Martinez*, 342 Ill. App. 3d 849, 859 (2003). The reviewing court must remember to give great deference to the performance of counsel. *Strickland*, 466 U.S. at 690. Such deference to counsel's conduct should be given within the context of trial and without the benefit of hindsight. *People v. King*, 316 Ill. App. 3d 901, 913 (2000), citing

Strickland, 466 U.S. at 689. To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's insufficient performance, the result of the proceeding would have been different. *People v. Easley*, 192 Ill. 2d 307, 317 (2000). "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice," then "that course should be followed." *Strickland*, 466 U.S. at 697. "Effective assistance of counsel means competent, not perfect, representation." *People v. Rodriguez*, 364 Ill. App. 3d 304, 312 (2006).

¶ 38 Here, defendant's claim of ineffective assistance of counsel fails because defendant is unable to establish the requisite prejudice under *Strickland*. Laying aside the question of whether counsel's actions fell below an objective standard of reasonableness, we find that defendant's claim fails because he is unable to show resulting prejudice where the evidence adduced at trial was so overwhelming that, even if the jury had been instructed on simple robbery in addition to armed robbery, it would not have changed the result.

¶ 39 Specifically, evidence at trial showed that on May 11, 2011, defendant participated in an armed robbery of Bradley Foreman. Foreman testified that he was approached by defendant, Landers, and a third offender who ushered him toward a quiet area in Oak Park. Once there, defendant took his briefcase containing his cell phone as well as wallet with credit cards. He testified that defendant then frisked him and took cash from his pocket. During this time, Foreman testified, Landers was pointing a gun at him. Foreman watched while the three offenders ran toward and fled in a silver sedan. Foreman memorized the license plate number and reported it to police. Foreman identified defendant as the offender who took his briefcase

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and frisked him in a subsequent photo array, a line-up, and in open court. Foreman testified that he had no doubt about his identification of defendant.

¶ 40 Various police officers testified to a series of events from which they eventually found the silver sedan and apprehended defendant, Landers, and Brady. Foreman's cell phone was recovered from the sedan. They also recounted a series of events by which they apprehended Zimmerman, who led them to the gun used in the armed robbery.

¶ 41 ASA Castillo testified that she and defendant prepared a handwritten statement. She read that statement into the record, including defendant's admission that he was in a car with Landers and a co-offender named Darryl when Landers saw someone walking and said, "I got somebody, get out of the car." Defendant understood that to mean they were going to rob somebody, as they had an agreement that if any of them robbed somebody, they would each "get a cut." Defendant then described the robbery, explaining that he took the victim's bag, while Landers took the cell phone and wallet.

¶ 42 Defendant himself testified that he took part in the robbery, but claimed there was no prior plan to commit the robbery. Instead, he testified:

"[THE DEFENDANT:] It was no- - it wasn't no plan. We was coming - - we was on our way home, and it just happened. And then [ASA Castillo] said, well, then how was you all going to split it up? And I was like I guess - - I told her like I guess that there was no understanding we were going to split it up. It was whoever did something was going to get a cut."

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On cross-examination, however, defendant specifically admitted he knew he and his co-offenders were going to rob Foreman:

"[ASA JOSEPH LATTANZIO] Q: And what - - your buddy says I got it, let's go?

[THE DEFENDANT] A: Yes.

Q: And you know that means we're going to go rob him, right?

A: Yes."

Defendant also admitted to robbing Foreman:

"[ASA LATTANZIO] Q: And you joined in on taking everything from Brad Foreman, right?

[THE DEFENDANT] A: Yes."

Additionally, defendant admitted to knowing Landers had a gun, but explained that he took part in the robbery without knowing in advance that Landers had the gun:

"[ASA LATTANZIO] Q: And at the time you were taking everything with your pals from Brad Foreman - - and your buddy had a handgun, right?

[THE DEFENDANT] A: Yeah.

* * *

Q: Well, you knew that when you got out of the car the idea was to get whatever you could from this guy, right?

A: Yes, but I ain't know he had a weapon."

Defendant also admitted on cross-examination that there was "an unspoken agreement that when [they] robbed [this person, they] would share the proceeds."

¶ 43 The evidence clearly established that defendant committed armed robbery. Defendant's assertion that, while he agreed to participate in a robbery and did admittedly participate in the crime, he did not know that his co-offender had a gun until the robbery was in progress is of no import in our analysis of this issue. The case law is clear that, even if a defendant is unaware his co-offender possessed a weapon, the defendant is still accountable for armed robbery. See *People v. Garrett*, 401 Ill. App. 3d 238, 244 (2010) ("Illinois law is clear that one can be held accountable for a crime different than the one that was planned"); *People v. Bartlett*, 91 Ill. App. 3d 138, 141 (1980) (A defendant may be held accountable for armed robbery even where he asserts that he was unaware that his codefendant possessed a weapon).

¶ 44 Defendant voluntarily attached himself to a group bent on illegal activity when, after hearing Landers say, "I got somebody," and knowing his companions were planning to rob somebody, followed them out of the car, participated in the taking, fled from the scene, maintained a close affiliation with his companions after the commission of the crime, and failed to report the crime. The evidence that defendant was guilty of armed robbery was overwhelming, and, therefore, defendant cannot successfully argue that counsel's failure to request an instruction for simple robbery prejudiced him in any way.

¶ 45 ii. Defendant's Sentence

¶ 46 Next, defendant contends that the trial court erred in sentencing him to 28 years'

imprisonment to be served at 85%. Specifically, defendant asks this court to amend his sentencing order to reflect that defendant may receive day-for-day credit for good conduct toward the completion of his 28 year sentence because the trial court did not make the finding of great bodily harm required to order defendant's sentence to be served at 85%. The State agrees that the court erred, but argues that the proper remedy is for this court to vacate defendant's sentence as void and remand for a new sentencing hearing.

¶ 47 Section 3-6-3(a)(2.1) of the Unified Code of Corrections sets forth the general rule that those imprisoned will be entitled to day-for-day good-conduct credit against their sentences. 730 ILCS 5/3-6-3(a)(2.1) (West 2010). The term "truth-in-sentencing" refers to a change in the statutory method which the Department of Corrections uses to calculate the amount of good-conduct credit. *People v. Davis*, 405 Ill. App. 3d 585, 602 (2010); *People v. Salley*, 373 Ill. App. 3d 106, 109 (2007). Under the truth-in-sentencing provisions, a person convicted of certain enumerated offenses, including armed robbery which resulted in great bodily harm, would receive no more than 4.5 days of credit for each month of his sentence. 730 ILCS 5/3-6-3(a)(2)(iii) (West 2010); *Davis*, 405 Ill. App. 3d at 602. Thus, a defendant convicted of armed robbery where the trial court has made a finding of great bodily harm must serve at least 85% of his sentence and does not receive normal day-for-day good-conduct credit. *Salley*, 373 Ill. App. 3d at 109.

¶ 48 When sentencing defendant to 28 years' incarceration, the trial court specifically stated that "it is an 85 percent sentence." Defendant's mittimus also reflects that "[t]his is an 85% sentence with 3 years MSR."

¶ 49 Section 3-6-3(a)(2)(iii) of the Code only denies good conduct credit for an armed robbery that resulted in great bodily harm to the victim. 730 ILCS 5/3-6-3(a)(2)(iii) (West 2010).

Because that factor was not established in this case, we vacate the portion of the trial court's sentencing order which requires defendant to serve at least 85% of his sentence pursuant to section 3-6-3 of the Code, and find that defendant is entitled to day-for-day credit on his armed robbery conviction. *People v. Cunningham*, 365 Ill. App. 3d 991, 997 (2006) (where no great bodily injury was suffered by victim of crime, reviewing court vacated the portion of the trial court's sentencing order requiring the defendant to serve at least 85% of her sentence). Pursuant to our authority under Supreme Court rule 615(b)(1), we order the clerk of the circuit court to correct the mittimus by substituting the language "This is a sentence with 3 years MSR" in place of "This is an 85% sentence with 3 years MSR." 134 Ill. 2d R. 615(b)(1).

¶ 50 III. CONCLUSION

¶ 51 In sum, we affirm defendant's conviction and sentence for armed robbery; vacate only the portion of the trial court's sentencing order requiring defendant to serve at least 85% of his sentence; and correct the mittimus.

¶ 52 Affirmed in part; vacated in part; mittimus corrected.